Supreme Court, U.S.
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NO. 99-78

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioner,

v.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Bank of America, NT&SA, formerly Seattle-First National Bank, fdba Seattle First National Bank, aka Seafirst Bank (Plaintiff and Appellee below. Bank of America is a publicly traded entity)

Fishing Vessel Owners Marine Ways Inc. (Intervenor Appellant below. Fishing Vessel Owners Marine Ways Inc. is a closely held Washington Corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public)

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I. STATEMENT OF THE CASE

This case arises out of a vessel arrest and foreclosure. The vessel PENGWIN, Official No. 586 183 ("Vessel") was arrested by Seattle First-National Bank, d/b/a Seafirst Bank ("Bank"). Fishing Vessel Owners and Marine Ways, Inc. ("FVO") intervened, claiming a necessaries lien for the unpaid balance due for labor, parts and materials. The Bank's claim was to foreclose its mortgages on the Vessel, while FVO sought to foreclose a lien for necessaries.

The Bank first placed a mortgage on the Vessel for $735,000 on June 23, 1988. The Bank placed a second mortgage on the Vessel for $300,000 on September 20, 1990. FVO's lien arose on June 26, 1991. The unpaid balance on FVO's debt is $175,208.85.

On June 19, 1991, a week before FVO's lien arose, the Vessel owner signed a renewal and replacement note for $1,400,000. Unfortunately, the mortgage was not recorded until July 10, 1991, two weeks after FVO's lien arose. The mortgage was increased to $1,900,000 in December, 1991, then reduced to $1,733,000 in October, 1994. Another mortgage of $1,150,000 was recorded thereafter to cross-collateralize the debt of another company.[1]

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[1] FVO misstates the facts when it alleges that the Bank "affirms [the vessel] is only worth $575,000." Pet. 21. This was the auction price of the Vessel. FVO argues that the Vessel was undercapitalized and that the Courts below erroneously analyzed the evidence regarding the nature

The $1,400,000 mortgage of July 10, 1991, in addition to extending further credit to the Vessel owner, was intended to renew and replace the two earlier mortgages of $725,000 and $300,000, as were the subsequent mortgages of $1,900,000 and $1,733,000.

The $735,000 and $300,000 mortgages, both recorded well before FVO's lien, were paid down to $745,144.77. This was their lowest balance at any time.

The Vessel was sold by the U.S. Marshal on May 7, 1997, and the District Court confirmed the sale. Because the sale brought only $575,000, less than the Bank's debt of $745,144.77 under its two prior mortgages, the Bank sought summary judgment to establish the priority of its claim over FVO. The District Court granted the Bank's motion for summary judgment, establishing the Bank's priority. On appeal, the Ninth Circuit affirmed.[2]

The courts below acknowledged and enforced the general rule that in the absence of a clear indication of contrary intent, execution of a new mortgage in renewal of a former one does not extinguish priority of the former one. App. B; App. A,

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and amount of the debt and the Bank's intentions. Pet. 21-25. These are factual issues, not normally reviewable here. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

[2] FVO misstates the facts when it contends that the Bank prepared the Vessel owners' affidavits regarding prior and subsequent liens. Pet. 6. They were prepared by a commercial documentation service and, most importantly, signed by the Vessel owner, not the Bank.

p. 6. This general rule is referred to as the mortgage renewal rule ("Renewal Rule").

Application of the Renewal Rule in this case did not prejudice FVO. As stated above, the Bank's debt at the time FVO's lien claim arose, which was carried forward to the latest incarnation of the mortgages, exceeded the proceeds generated by the sale of the Vessel. Before the first two mortgages were consolidated and subsequently renewed, FVO was a junior lien claimant in the amount of $745,144.77. The debt in question was carried forward in every renewal note and mortgage.

II. REASONS FOR DENYING THE WRIT

A. The Petition Should be Denied Because the Opinion Below Does not Conflict with the Settled Law of the Circuits and Because Minor Developments in the Renewal Rule are not of Significant Public Importance.

1. The Opinion Below Does Not Conflict with the Settled Law of the Circuits. In this case, the Ninth Circuit applied the mortgage Renewal Rule as developed in the Fifth and Eleventh Circuits and found that the Bank's subsequent mortgages on the PENGWIN retained the priority of the Bank's earlier preferred ship mortgages. App. A, p. 3. Insofar as the Petition asserts a conflict among the circuits, the Petition misstates the law.

All three circuits agree that when parties execute a new mortgage in renewal of a former one, the renewal does not have the effect of extinguishing the priority which the original

mortgage carries. Merchants & Marine Bank v. the T.E. WELLES, 289 F.2d 188 (5th Cir. 1961); Southern Reef Fisheries v. O/S BROADFIRE LEADER, 786 F.2d 1523 (11th Cir. 1986); and Bank of America v. PENGWIN, App. A, CV-97-36050 (9th Cir. 1999).[3]

Whether the execution of the subsequent note and mortgage is a renewal and replacement, preserving the priority of the previous obligation, or a new note and mortgage extinguishing the priority of the earlier debt is a matter of intent. So long as a portion of the initial debt remains, "the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuance of the same security." Barnouw v. S.S. OZARK, 304 F.2d 717, 723 (5th Cir. 1962). The District Court noted that the Bank submitted evidence of such intent. App. B, p. 27. See also App. A., p. 7.

The court in T.E. WELLES held that a subsequent mortgage was a renewal and replacement entitled to the same priority, even though the second mortgage contained an additional advance. 289 F.2d at 194. In that case, the original note secured by the ship mortgage was for $12,000.00 and as FVO points out, Pet. 19, the renewal note and mortgage was for $11,500.00. What FVO fails to mention is that prior to the execution of the renewal note, the principal had been reduced

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[3] This result was suggested as long ago as 1933 in The BERGEN, 64 F.2d 877, 880-1 (9th Cir. 1933).

to less than $8,000.00. Even though the renewal note contained an additional advance of $4,000.00, the court conferred priority status to the renewal mortgage. 289 F.2d at 194.

The court in Barnouw also held that subsequent mortgages were renewals and replacements even though the amount of the mortgage debt was increased. Barnouw, 304 F.2d at 722, 724. When addressing the issue of an increase in the face amount of the mortgage, the court in Barnouw relied in part on the fact that:

> Whatever the consequence of the increased debt, or the change in interest rate, it is uncontradicted that for an amount way in excess of the proceeds from the Marshal's sale of the vessel, the former debt continued unpaid.

Barnouw, 304 F.2d at 722. See also Southern Reef, 786 F.2d at 1524 (11th Cir. 1986).

Similarly, when the existing prior debt exceeded the proceeds from a Marshal's sale, an increase in the debt due on a mortgage was not held to preclude application of the renewal mortgage rule. CIT Corp. v. M/V WINCHESTER, 643 F. Supp. 1059, 1064 (E.D. Va. 1986).

Further, all three circuits agree, contrary to FVO's argument, that a mortgage need not be a mirror image of the prior mortgage which it purports to renew. If the intent of the

parties is to renew and replace a mortgage, it matters not that certain of the parties or terms have changed, or that the amount financed has been increased. The Ninth Circuit in this case has said that the Bank only retains priority on the amount outstanding at the time of renewal; this conservative application of the Renewal Rule does not conflict with the law of the other circuits.

FVO contends that the court below developed a new "partial priority" variation of the Renewal Rule which conflicts with the decisions of the Fifth and Eleventh Circuits. The Ninth Circuit court did not develop a new doctrine of partial priority. Petitioner again misstates the law as stated by the Ninth Circuit below. The circuits which have addressed the issue agree that the mortgagee extending additional credit retains the priority of the original mortgage(s), but only if the lien claimants are left in the same position they would have occupied had no renewal mortgages been executed. T.E. WELLES, 289 F.2d at 194, Barnouw, 304 F.2d at 723, and PENGWIN, App. A, p. 15. A lien Claimant is left in the same position as before renewal if the amount of debt accorded priority over the Claimant's lien remains unchanged. That is exactly what happened in the instant case. FVO was left in the same position after renewal. The unpaid Bank debt that had priority when FVO's lien arose was the same unpaid Bank debt that had priority when the vessel was arrested and sold. FVO

was not prejudiced by the application of the Renewal Rule because the Vessel did not bring a sufficiently high price at the Marshal sale to pay the Bank's priority claim.

A change in parties, terms, or even amount financed does not preclude a subsequent mortgage from qualifying as a renewal. See e.g. Avondale Shipyards v. TANK BARGE ETS 2303, 754 F.2d 1300 (5th Cir. 1985)(finding that a change in the mortgagor did not preclude application of the rule). FVO contends that the subsequent mortgage is not a renewal because for the subsequent mortgage was secured by another vessel in addition to the PENGWIN. The mere addition of collateral, even collateral owned in part by other parties, does not preclude application of the Renewal Rule. Id. The restructuring of the debt in this case is not atypical, and did not prejudice subsequent lienors. As in Avondale, a change in terms does not preclude renewal.

FVO argues that because the subsequent mortgage was not a mirror image of the prior mortgage it cannot be a renewal. This is not the proper test; what matters is that the Bank intended to preserve its mortgage priority, at least to the extent of the prior mortgage, and that the junior lien holders are not harmed. These principles were honored in this case. The Ninth Circuit correctly followed the Renewal Rule.

2. This Case Poses No Questions of Public Importance. Although matters of admiralty law are a special

concern of the federal courts, U.S. Const. Art. III, §2, the Renewal Rule is a relatively small part of maritime law. Well-settled in the Fifth Circuit for thirty-eight years in a decision that has been uniformly followed ever since by every court to consider the question, the rule need not be adjudicated by the Supreme Court. The rule as developed and applied by the courts provides certainty for all parties: the lenders can be certain of retaining their priority upon refinance, and the vessel suppliers can be certain of the amount of debt a vessel secures by looking at the abstract before extending credit.

Indeed, the Renewal Rule is widely cited and followed in the cases, digests and treatises. See, e.g., Maryland National Bank v. TWICE AS NICE, 1994 AMC 2062, 2070-2 (D. Del. 1993), Marine Mart, Inc. v. O/S MISS DARLA DAWN, 273 F. Supp. 353, 356 (S.D. Tex. 1967), First Fidelity Bank v. Bock, 279 N.J. Super. 172, 652 A.2d 262 (N.J. Sup. 1994), 2 Benedict on Admiralty, § 70g, p. 6-73 (1998), L. Schoenbaum, Admiralty and Maritime Law, § 9-6, p. 512 (2d ed. 1994), Gilmore and Black, The Law of Admiralty, pp. 723-4 (2nd ed. 1975), Michael A. DiSabatino, Annotation, What is 'A Preferred Maritime Lien' Under Ship Mortgage Act?, 42 ALR Fed. 540 (1979), 70 Am. Jur. 2d Shipping, § 182 (1987).

Although the rule is infrequently litigated, the maritime industry relies on the rule and the attendant certainty. This case presents no pressing constitutional or federalism issue. The

uniformity of the cases, their citation in support of the Renewal Rule, and their very paucity suggest there is no important interest that would benefit from adjudication by this Court.

B. Presumably Congress Was Aware of the Judicial Interpretation of the Ship Mortgage Laws and Intended to Adopt that Interpretation When it Recodified the Laws Without Substantive Changes.

FVO argues that the federal courts have judicially imported a doctrine of renewal which contradicts Congress' intent in enacting and revising the various ship mortgage laws. FVO explains that in 1988 Congress revised and recodified centuries worth of ship mortgage statutes, effective January 1, 1989. FVO points out that Congress intended no substantive change in lien law by this recodification. As the cases cited above demonstrate, by this time the Renewal Rule had been well developed by the courts.

Because Congress recodified the ship mortgage laws in 1989 without substantive changes, it is presumed that Congress was aware of the judicial interpretation of the ship mortgage laws and intended to adopt that interpretation when it reenacted the laws without change. Bragdon v. Abbott, 118 S.Ct. 2196, 141 L.Ed.2d 540, on remand 163 F.3d 87 (1998).

C. The Renewal Rule is Good For the Maritime Industry.

The Renewal Rule has been effectively governing the priority of preferred ship mortgages for thirty-eight years; it makes little sense to abandon a workable rule simply because it was developed by the courts rather than the Congress. Further, the Rule comports well with the ship mortgage laws in that both further investment in the shipping industry. T.E. WELLES, 289 F.2d at 193-194. The Renewal Rule furthers investment in vessels by ensuring that qualifying ship mortgages retain priority at least to the extent of the balance outstanding when the mortgage is replaced. The Renewal Rule allows a creditor to refinance a vessel without losing priority on the amount then outstanding. At the same time, by limiting priority to the amount of debt outstanding at the time of the refinance, the Rule protects subsequent creditors by limiting priority of the mortgage to the amount outstanding at the time of the renewal. Before extending credit, junior lienors can determine the amount of debt a vessel secures by reviewing the vessel abstract.

While infrequently litigated, the Rule has been consistently applied throughout the latter half of the Twentieth Century. The courts developed the Rule, recognizing that as a matter of public policy, the best thing for the maritime industry is to keep boats afloat, in good condition, and working at their

peak of performance so they can pay their debts. This policy is reflected in Congress' enactment of the Ship Mortgage Act. See Detroit Trust Co. v. The THOMAS BARLUM, 293 U.S. 21 (1934). If lenders cannot make subsequent loans to support the undertaking without jeopardizing their earlier advances, this policy would be hindered for no good reason. The refinance of vessel debts benefits suppliers such as FVO by keeping vessels in navigation, making it possible for the vessels to pay their debts.

In many cases, as here, vessel owners seek further credit to finance improvements on their vessels. Suppliers, such as FVO, directly benefit from the extension of credit. The best policy for mortgage priority is one that will keep the vessels working and producing income so that they can pay their debt to both the lenders and the suppliers. Thus, as a policy matter, the investment-fostering Renewal Rule is good for the maritime industry.

III. FVO'S CHALLENGE TO THE MORTGAGE RENEWAL RULE WAS NOT MADE BELOW

The Supreme Court should not consider FVO's challenge to the mortgage renewal rule because the argument has not been raised or resolved in the lower courts. FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596, 604, 493 U.S. 215, 224, 107 L.Ed.2d 603, 58 USLW 4079 (1990). In FW/PBS, Justice O'Connor explained that the Supreme Court generally does not

consider an argument unless it was raised below: "It is this court's practice to decline to review those issues neither pressed nor passed upon below." Id. 110 S.Ct. at 604, 493 U.S. at 224.

The only challenge to the Renewal Rule raised below was FVO's challenge to the District Court's application of the rule. FVO should not be able to now expand its list of alleged errors to include a challenge to what it describes as the "judicially imported" Renewal Rule.

IV. CONCLUSION

For the reasons given above, the petition should be denied.

Dated: August 9, 1999

Respectfully submitted,

/s/ _____
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